

**New Stanton West Auto Truck Plaza, Inc. d/b/a
Union 76 Auto Truck Plaza and Dorothy D.
Shepler. Case 6-CA-14821**

26 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER

On 15 September 1982 Administrative Law Judge Robert M. Schwarzbart issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge: This case was heard on May 17 and June 14 and 15, 1982, in Pittsburgh, Pennsylvania, pursuant to charges filed¹ by Dorothy D. Shepler, an individual, and a complaint issued October 30, 1981.² The complaint alleges that New Stanton West Auto Truck Plaza, Inc. d/b/a Union 76 Truck Plaza, herein the Respondent, violated Section 8(a)(1) of the National Labor Relations Act, herein the Act, by threatening Shepler and/or other of its employees with discharge and by constructively discharging Shepler because she and other employees had concertedly protested their wages, hours, and working conditions to the Respondent. The Respondent, in its answer, denies the commission of unfair labor practices, and argues that, even if it were found that Shepler had been unlawfully discharged, any remedy would be limited by the fact that it had reemployed her 2 weeks after her departure and that she, thereafter, had resigned on her own initiative without returning to work.

¹ The original charge was filed on August 17, 1981. The first and second amended charges were filed on September 4 and October 28, 1981, respectively.

² All dates hereinafter are within 1981 unless otherwise specified.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, filed by the General Counsel and the Respondent, have been carefully considered.

Upon the entire record³ of the case and my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Pennsylvania corporation with a facility located in Smithton, Pennsylvania, is engaged in the retail and nonretail sale of automotive fuel and related products and services and the retail sale of food and drink.

During the 12-month period ending July 31, 1981, the Respondent, in the course and conduct of its operations, purchased and received at its Smithton facility products, goods, and materials valued in excess of \$50,000 directly from points located outside the Commonwealth of Pennsylvania. During this same 12-month period, the Respondent sold goods and services valued in excess of \$50,000 to firms which are themselves directly engaged in interstate commerce.

From the foregoing conceded facts, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent operates a restaurant and automotive service station at Smithton, Pennsylvania. Only the restaurant is involved herein. The Respondent's restaurant employees are not represented by a union.

The restaurant, which never closes, schedules three shifts daily. The first shift works from midnight to 8 a.m., the second or daylight shift from 8 a.m. to 4 p.m., and the third shift is on from 4 p.m. to midnight. From March to mid-April the Respondent employed five full-time waitresses and one part-time waitress, three grill cooks, three dishwashers, and a cashier on the first shift. On the second, or 8 a.m. to 4 p.m. shift, the Respondent used seven waitresses, three grill cooks, three preparation cooks, a chef, and a cashier. For the third shift, there are eight full-time and four part-time waitresses, four grill cooks, three dishwashers, and a cashier. In addition, the Respondent employs three bus women who mostly work part time, in tandem, on the second and third shifts during various days of the week.

Roger Few is the Respondent's general manager and Paul Lehman the restaurant manager. Since January, Rebecca Pohill has been assistant restaurant manager and second-shift supervisor.

Dorothy Shepler, the Charging Party, was assistant supervisor and a waitress on the 8 a.m. to 4 p.m. shift. The

³ Rulings on the General Counsel's motions to correct the record and his brief in certain respects are set forth in the Appendix to this Decision. [Omitted from publication.]

Respondent, contrary to the General Counsel, contends that she was a supervisor within the meaning of the Act and, therefore, outside the statutory protections afforded.

B. Shepler's Supervisory Status—Facts and Conclusions

Shepler was hired as a waitress on the 8 a.m. to 4 p.m. shift⁴ in August 1978, and, in January 1979, was designated assistant supervisor by the then incumbent restaurant manager, Gil Bianchi. Shepler, at that time, replaced Norma Jean Patterson who, in turn, advanced from assistant supervisor to supervisor on the same shift.⁵

As assistant supervisor, Shepler continued to work full time as a waitress, serving tables as before. Until January, while Patterson still was supervisor, Shepler functioned as assistant supervisor only on the 2 days each week when Patterson was off. On those occasions, she was paid approximately 50 cents an hour more than the waitresses with whom she worked.

As assistant supervisor, Shepler checked the waitresses' work stations at the end of the shift to make certain that all dispensers and containers for salads, salad dressings, and condiments were filled, and that the drinking glasses and the stations were clean. Shepler was expected to ask the waitresses responsible to correct any deficiencies found. As no waitress ever refused her requests in this regard, Shepler never contributed to the discipline of a waitress.

Waitresses on the daylight shift who called to report absent would reach the cashier who, in turn, notified either the restaurant manager or Shepler. In the absence of higher supervision, Shepler was authorized to check the work schedule and call in a waitress who was not listed for work that day to serve as a replacement. Shepler did this on one occasion. The waitresses on her shift did not have that responsibility.

Shepler denied that she had been consulted by the restaurant manager in the evaluation of employees, or that she had made recommendations concerning personnel.⁶ Shepler was not asked about pay increases for waitresses and, while she was employed, none were given.

While Bianchi was restaurant manager, Patterson, as supervisor, prepared the waitresses' work schedules. Patterson was later relieved of this task by Lehman, but scheduling never was arranged by Shepler. Work scheduling had been a principal difference between Patterson's duties while supervisor and those of Shepler as Patterson's assistant.

As assistant supervisor, Shepler was asked by waitresses to initial guest checks to verify changes in food orders and/or arithmetic.⁷

Shepler, contrary to Lehman, testified that she had not been authorized to independently grant time off or allow waitresses to go home early.⁸ She related that, since Patterson's replacement by Pohill in January, Lehman and Pohill always were on the premises at the same time as herself.

Although Shepler was expected to ask less busy waitresses to assist those with more customers, Shepler described such directives as unnecessary as waitresses ordinarily requested assistance from and helped each other. Her only authority over the kitchen was to request the correction of unappealingly prepared dishes, called to her attention by waitresses.

Lehmann testified, in effect, that Shepler's account of her responsibilities had been unduly modest. In addition to checking the cleanliness of the waitresses' work stations and whether the various dispensers and containers were filled, verifying guest check changes, summoning replacements for absent waitresses, and sending waitresses home early if business slowed in the afternoon, Shepler also could approve service of free complimentary meals where the original offered had been unsatisfactory.

Lehman related that in January, when Pohill became shift supervisor and assistant manager, more was expected of Shepler. Before then, Patterson and Shepler had worked the same 8 a.m. to 4 p.m. hours and Shepler functioned in a special capacity only during the 2 days of the week when Patterson was not scheduled to work. Pohill, however, although supervisor of the second shift assumed a different status from that of her predecessor. Pohill no longer served tables, but wore street clothes and worked during parts of two shifts. Accordingly, from January on, Pohill did not arrive for work until noon and remained until 8 or 9 p.m. Therefore, for 4 hours each morning, from 8 a.m. to noon, when Pohill appeared, Shepler was in effective charge of the restaurant floor. Although Lehman often was on the premises during the morning hours, he frequently was involved in his office with suppliers' representatives, paperwork, and other business.⁹

Shepler never had been permitted to schedule other waitresses, her authority to initial changes in guest checks was a routine method of verification performed by other waitresses in her absence, and the isolated instance when she called in an unscheduled employee to replace an absent waitress followed a specific company guideline. Had the waitress called refused to come in,

⁴ Shepler continued to work the daylight shift during her time with the Respondent.

⁵ Patterson continued as second-shift supervisor until January 1981, when she was reverted to waitress on the same shift. She was replaced as shift supervisor by Rebecca Pohill who also became assistant restaurant manager.

⁶ Restaurant Manager Lehman, to the contrary, testified that he had consulted with Shepler about employees on her shift on a number of occasions and that she never had been reticent about offering recommendations.

⁷ Although Patterson testified that waitresses Ruth (Jean) Finley and Jenilee Davis also had initialed check alterations, Finley explained that they only had been asked to do this in Shepler's absence.

⁸ Lehmann asserted that after the lunch period, when business slowed, Shepler could decide whether any waitresses should be sent home early and who should leave.

⁹ As Shepler was quite vague in her recollection of Pohill's work schedule, her testimony that Pohill was on the premises during the same hours as herself is not credited. Lehman's accepted testimony in this regard was clear and corroborated by waitress Finley.

there is no evidence that Shepler could have done more than contact someone else.

Principal factors indicating a special status for Shepler were that during the first half of her shift, in her final months with the Respondent, she was the ranking individual regularly assigned to the dining area, and, while functioning as assistant supervisor, was more highly paid than were the other waitresses. These considerations, however, are not controlling and the Board has not found supervisory status even where these elements were present in combination with responsibilities and discretion beyond what had been afforded Shepler.¹⁰

Moreover, as Shepler had spent no more than 50 percent of her time functioning as assistant supervisor under Pohill, and much less than that while Patterson was shift supervisor, she would come within the purview of the Act even if her responsibilities and discretion had been greater than they were. The Board has held that employees who spent 50 percent or more of working time performing nonsupervisory duties should not be denied the protections of the Act, and where applicable has included such individuals within the collective-bargaining units.¹¹ Therefore, I conclude that Shepler was not a supervisor within the meaning of Section 2(11) of the Act and was entitled to the statutory protections afforded thereunder.

C. Shepler's Alleged Unlawful Constructive Discharge

1. The facts

On March 3, Joan Cross, a waitress on the 8 a.m. to 4 p.m. shift, was injured in an automobile accident and was granted a leave of absence.¹² To substitute for Cross, Restaurant Manager Lehman began to schedule the remaining waitresses on that shift to work 6 days a week on a rotational basis, rather than their usual five.

Shepler and Patterson testified that, on March 17, they and the other waitresses on the second shift attended a meeting called by Restaurant Manager Lehman, who asked whether he should hire an additional waitress or continue their rotating 6-day schedule. All present, except Ruth (Jean) Finley, favored the hire of an additional waitress. Finley declared that she did not mind working the 6 days.

Although Lehman ended the meeting without committing himself to a course of action, he continued the 6-day work schedule to the waitresses' growing discontent.

On March 24, when the daylight waitresses arrived for work, they again complained to each other about their longer schedule. Shepler related that waitresses Paula Kasic, Dolores Walker, and Norma Patterson¹³ and herself agreed that Lehman should be told that they did not want to work the 6 days. As Shepler was the assistant supervisor, the others agreed that she should be the spokesperson. Finley, who previously had not objected

to the longer workweek, reassured Shepler, when asked, that she now stood with the others. As Shepler refused to see Lehman by herself, she was accompanied by Kasic and Walker. The other waitresses, including Patterson, remained in the dining room.

As Shepler, Kasic, and Walker reached the rear of the restaurant, they met Lehman emerging from his office. Shepler loudly told Lehman that they wanted to talk to him, and announced that all the girls had decided that they did not want to work 6 days a week. According to Shepler, Lehman's face became red and he told them, "If you don't work, I'll fire you." Shepler replied that she had been sick and would get him a doctor's excuse. The waitresses then returned to work. After they reached the dining area, Walker told the other waitresses, including Shepler and Patterson, that they all ought to call in sick the next day. No one replied to this.

That evening, after work, Shepler kept an appointment with her physician and later called Lehman at the restaurant, informing him that she had been to her doctor who had made an appointment for her to return for an injection at noon the next day.¹⁴

She asked if Lehman wanted her to work the next day from 8 a.m. until 11:30 a.m. Lehman asked "why in hell" had she made the appointment.¹⁵ Shepler replied that it had been the physician, not herself, who had made the appointment. Lehman told her that he would let it go that time, but the next time it happened it would mean her job.¹⁶

Shepler related that, on April 4, she was called to Lehman's office where she met with him and Assistant Manager Pohill. Lehman told Shepler that, after April 9, she would have to work the 4 p.m. to midnight shift. She replied that she could not work those hours and asked why he was putting her on that shift. He answered, "Conflict on daylight," but refused to explain his meaning. Shepler protested that she could not work from 4 p.m. to midnight as she had a daughter to take care of and as nobody wanted to babysit at those hours. Lehman told her that she would have until April 9 to think about it.

Shepler testified that her daughter, whom she was raising alone, then was 14 years of age and that Lehman had known of her need for a sitter as, during various earlier conversations, she had told him that her own mother, who had assisted in this, was suffering from a very serious ailment and possibly would require hospitalization.¹⁷ Shepler was concerned that someone be with her daughter when she came from school.

On April 9, at the end of her shift, Lehman called Shepler into the stockroom, where, again in Pohill's

¹⁰ See the Board's decision in *Arby's*, 247 NLRB 53, 56-57 (1980), and cases cited therein, enforcement denied 640 F.2d 893 (7th Cir. 1981).

¹¹ *Statler Industries*, 244 NLRB 144, 151, fn. 7 (1979), modified on other grounds 644 F.2d 902 (1st Cir. 1981); *Amalgamated Clothing Workers of America, AFL-CIO, CLC*, 210 NLRB 928, 930 (1974).

¹² Cross eventually returned to her job in late April.

¹³ By March, as noted, Patterson no longer was a supervisor.

¹⁴ Shepler later testified at her state unemployment compensation hearing, the record of which was received in evidence, that she had had the flu at the time.

¹⁵ March 25, when Shepler returned to the doctor, was to be one of her scheduled days off. However, on March 24, Lehman notified Shepler that she would be expected to work on March 25 under the 6-day regimen then in effect.

¹⁶ At the hearing, Shepler produced a physician's note. She testified that, although dated March 25, it had been given to her during the March 24 visit, but had not been turned over to the Respondent.

¹⁷ Shepler's sister was not available to look after her daughter until the evening hours.

presence, he asked what Shepler was going to do. Shepler answered that she could not work from 4 p.m. to midnight as she did not have anyone to sit with her daughter. She asked if Lehman would reconsider or, perhaps, allow her to work the midnight to 8 a.m. shift. Lehman refused, declaring that Shepler could not handle the drunks. Shepler told Lehman that, in the time since their April 4 discussion concerning reassignment, she had asked her mother and sister to look after her daughter, but they had refused to do so during those hours. This, she reiterated, was the reason she was asking to work the midnight to 8 a.m. shift. When Lehman did not agree, Shepler told him that she had no choice but to quit. That day, Shepler left the Respondent's employ.

About 2 weeks after her April 9 departure, Shepler, while at the Longhorn Saloon in Smithton, told the barmaid there, Dolores Delaney, of her job difficulties with the Respondent.¹⁸ Delaney, in turn, described Shepler's predicament to her employer, Robert Nagy.¹⁹ Shepler soon accepted Nagy's offer to call Roger Few,²⁰ for the purpose of bringing her, Few, and Lehman together. Few, after hearing Nagy's account of Shepler's story, agreed to see her immediately, and, at Nagy's suggestion, Shepler returned to the Respondent's premises.

Shepler testified that, when she entered Few's office, he asked if she had come about getting her job back. When she agreed that she had, Few said that he was happy to have her back. He asked if she could work any shift. Shepler reminded Few that he knew he reason she had left; she could not work the 4 p.m. to midnight shift because she did not have a sitter for her daughter. Shepler offered to work the 8 a.m. to 4 p.m. shift or, even possibly, the midnight to 8 a.m. shift. Few asked Shepler to wait and stepped out briefly. When he returned, he brought Shepler to Lehman's office where he left her with Lehman and Pohill.

Although Shepler does not have a detailed recollection of what was said during that interview, she recalled speaking again of the problems she would have working the 4 p.m. to midnight shift. However, she did then offer to work the 4 p.m. to midnight shift and Lehman had agreed to put her back to work on that shift. As Shepler put it, she did not know what she had been thinking about at the time. All she had known then was that she was broke and that she planned to go home and again ask her mother and sister if they would watch after her daughter during those hours. Accordingly, she took two uniforms with her and left, stopping at the Longhorn Saloon to thank Nagy for his assistance.

However, Shepler's mother and sister refused to look after Shepler's daughter during the times in question and, within the next 2 hours, Shepler called Lehman, notifying him that she would not be able to work the 4 p.m. to midnight shift. The uniforms later were returned to the Respondent. Shepler did not actually again perform services for the Respondent after April 9.

¹⁸ The Longhorn Saloon is about 1-1/2 miles from the Respondent's facility.

¹⁹ Nagy, who, besides owning the Longhorn Saloon, then also was mayor of Smithton. He had come to know Shepler from her visits to his establishment.

²⁰ Few, the Respondent's general manager, and Nagy were friends.

Shepler applied to the Commonwealth of Pennsylvania for unemployment compensation. At a hearing held by the State Department of Labor and Industry on June 3, Lehman testified, in part, as follows as to his reasons for attempting to reschedule Shepler:

REFeree: Mr. Lehman,—what's Mrs. Patterson have to do with all of this?

LEHMAN: She was working there at the same time—and her schedule was changed at the same time.

REFeree: Why was her schedule changed—

LEHMAN: For a similar—similar reason. But, there are two things that I think I would like to add that I have forgotten about before—a week—between a week and two weeks before all this came about, Mrs. Shepler was—involved with a move where she tried to convince all waitresses to call off sick together—everybody to call off sick one morning.

REFeree: How do you know that?

LEHMAN: Because two of the waitresses came and told me about it. And—they—they said they didn't want to do it and they wouldn't do it but—

* * * * *

REFeree: Now, did you talk to her (Shepler) at all about this effort to organize a stay—home day?

LEHMAN: No I—

REFeree: Did you ask her about that?

LEHMAN: I stayed off the subject: I just decided it was time to make a move, put her on the other shift.

REFeree: You didn't feel the fair thing would have been—to give her a chance to explain?—Or even deny?

LEHMAN: Well—

REFeree: What if this wasn't true?

LEHMAN: Well, there had been too much conflict involved. I just feel that the time had come, she had to be moved off the shift in order to get the work out of the people and it has proven so, since she left, because of the completely different attitude that even the customers are aware of.

Lehman testified that, when he became restaurant manager in May 1980,²¹ a major goal was to increase the number of local area residents at breakfast and lunch in relation to the transient truckstop trade by upgrading the service and the quality and appearance of the food on the 8 a.m. to 4 p.m. shift.

Lehman related that on March 24, as he was leaving his office, he was approached by Shepler, Kasic, and Walker. Shepler told him very loudly that the girls had talked it over and were not going to work 6 days anymore. Lehman replied that he was upset that Shepler did not have more concern for another employee and was surprised that she was not concerned about protecting

²¹ Lehman had a background of about 24 years in various aspects of the food industry.

that employee's job. He reminded Shepler that he still was making the schedule and would decide when they came to work. Nothing more was said at that time.

Later in the afternoon of that day, according to Lehman, Betty Pletcher, a grill cook, took him aside and told him to be careful. She expressed her belief that a number of his waitresses were going to call off sick the next morning.

Lehman went back to his office and called five waitresses who were scheduled on other shifts and asked them to be available for work the next day at 8 a.m., if needed. He then went to the restaurant area, assembled the waitresses, and told them that he had heard a rumor they intended to call off sick the next day. He stated that he did not care if they did because he would have five other waitresses in the restaurant by 8:15 a.m.²²

Lehman testified that, in order to make the daylight shift more profitable by attracting more local diners, he had found it necessary to transfer Shepler and Patterson to another shift, over their objections, in order to reduce friction and to improve atmosphere and service.²³

Lehman related that he had become aware of Shepler's personality problem in the early autumn of 1980. In the later summer and early fall of that year, he had been requested, respectively, by Norma Patterson, then shift supervisor, and waitress Jenilee Davis, to straighten out personal difficulties that each had been having with Shepler. Lehman had found it necessary to call Shepler and each of these respective disputants into his office to accomplish this.

²² Significantly, Lehman's account of the events of March 24 is corroborated by the testimony of waitress Dolores Walker, who, although a witness for the General Counsel, did not support Shepler in important areas. Walker related that during the second week of March she was asked by Pohill to work an extra day each week to fill in for Cross. As time passed, tension increased among the waitresses over the 6-day week. On March 24, Shepler announced that she was going to talk to Lehman on the matter and, at her request, Walke and Kasic accompanied her. When they met Lehman in the office area, Shepler, in a very loud voice, told him that they wanted to know what he was going to do about the situation. Was he going to hire anybody or not? Lehman, in turn, inquired whether it was too much to ask the girls to work one extra day until they could see how Cross was progressing and when she could be back. Walker, contrary to Shepler, did not recall that Lehman had threatened any of the waitresses with discharge if they did not work, and differed from Shepler by denying that she, at any time, had suggested that the employees call in sick to protest the 6-day week. What Walker related that she had said to the other waitresses, after March 24 protest to Lehman, was that if all the waitresses walked out she would go with them. Finally, Walker confirmed Lehman's account, not referred to by Shepler, that he had told the group of waitresses on the afternoon of March 24 that, if they did not show up the next morning, he could have five waitresses on the floor to replace them. To Walker's knowledge, nothing had been said to Lehman about calling in sick or walking out and no such work stoppage occurred. As Shepler's testimony was not supported in material respects by Walker, also a witness for the General Counsel, Lehman's account of the events of March 24, including his denial of threat of discharge when approached by the three waitresses, is credited. Had a threat of discharge been made when the 6-day workweek was protested it would have been sufficiently dramatic to be remembered by Walker. In accepting Walker's testimony, I note that, although she was employed by the Respondent at the time of the hearing and might have been reluctant to testify against her employer's interest, her testimony at the hearing, fully conformed to her pretrial affidavit, was consistent and, to that extent, foreseeable.

²³ Shepler was regarded by Lehman and, generally, by those of her former coworkers who testified as very moody and not always pleasant to get along with.

On the back of a personnel record used to record Shepler's attendance, punctuality, and wage history,²⁴ Lehman made the following two entries concerning disciplinary interviews he had had with Shepler in his office in 1980:

10/28—Told about her bad attitude and she had better change.

11/8—Told about complaints about her attitude from the employees.

The earlier entry was based on Lehman's own observations of the cold and impersonal way in which Shepler had approached and served customers at the restaurant, putting down water, throwing a menu onto the table, without exchanging pleasantries, and walking away. Depending upon her mood, Shepler had been gruff and impersonal with the Respondent's patrons, or, on other occasions, when in a good mood, she had been quite pleasant. In addition to what he personally had noted, Lehman described heated complaints he received about Shepler from various restaurant customers.

The second entry, for November 8, 1980, related to complaints Lehman received from waitresses Jenilee Davis and Jean Finley, who had spoken to him about Shepler's crudeness, pushy attitude, and general conduct. Lehman again had called Shepler into the office to discuss these complaints. After each of these interviews with Shepler, Lehman noted their occurrence on the back of her personnel record.²⁵ Although the two entries are the only recorded conversations with Shepler concerning her attitude, Lehman recalled speaking to her at random on other occasions in the same vein, explaining that the October 28 and November 8 incidents had been recorded because they were conducted in his office.

According to Lehman, after the November 8 talk, Shepler's attitude greatly improved, a situation which continued until the following February, when she began to return to her former habits. By March, Shepler was behaving as before he had spoken to her. However, in January, having earlier cautioned Norma Patterson, Lehman removed her as supervisor of the 8 a.m. to 4 p.m. shift, replacing her with waitress Rebecca Pohill, whom he also made assistant manager. Pohill thereafter worked from noon to 8 or 9 p.m., an arrangement which resulted in Shepler serving as assistant supervisor of the restaurant from 8 a.m. until noon, when Pohill arrived.

Lehman explained that, in spite of her negative attitude, Shepler could not be replaced as assistant supervisor by any of the more pleasant waitresses on her shift. Jenilee Davis, he related, had ability but "was afraid of the job and did not want to become involved." Paula Kasic, at 21 years, was considered too young and Lehman, generally, did not believe that the remaining waitresses would have been effective. Accordingly, he

²⁴ Lehman testified that it was his practice to record important matters concerning employees on the backs of their personnel cards, including instances of warning, discipline, and promotion.

²⁵ These entries, credited as authentic business records, contradict Shepler's testimony that she never had been criticized about her performance.

had spoken to Shepler at various times in the hope that she would improve.

Lehman testified that, during the early months of 1981, as Shepler returned to her old ways, conditions became tense and bitter among the waitresses on the second shift, which Lehman had been attempting to enhance. Lehman attributed this situation not only to Shepler, but also to Patterson who, although no longer supervisor, had remained on that shift as a waitress. A few days before making the shift changes that are the subject of this proceeding, Lehman overheard Patterson telling Kasic and Davis not to speak to Pohill. Approximately a week before that, as Lehman was walking away after having shared a joke with waitresses Walker and Davis, he heard Patterson chastise the two waitresses for having spoken to him.²⁶

Shepler had been scheduled to work on Sunday, March 29, but had called the supervisor of the midnight to 8 a.m. shift, Roberta Prpich, at 7:30 that morning to report that she would be unable to work because of illness. Prpich and her assistant supervisor, Jean Struthers, had reported this call to Lehman also telling him that Shepler, while intoxicated, had made a scene at the restaurant at or around 4:30 or 5 o'clock that same morning. Prpich and Struthers had been upset that, in these circumstances, Shepler had called in sick.²⁷

Lehman continued that on April 4, with Pohill present, he called Shepler into his office and announced that he was transferring her to the 4 p.m. to midnight shift. He told her that there had been just too much tension and too many problems on the daylight shift, and that he wanted her to go on the 4 p.m. to midnight shift, to get her act together and to try to do better. Shepler replied that she did not want to work the 4 p.m. to midnight shift because she had a teenage daughter and did not have anyone to watch her.²⁸ Lehman persisted, telling Shepler that he wanted her to try the 4 p.m. to midnight shift for a couple of weeks to see what she could work out. He suggested that she come back and talk to him at the end of that time and he would see what he

could do.²⁹ As no accommodation was reached, Shepler did not work for the Respondent after April 9.

Lehman explained that Shepler's proposed shift change, which also was intended to include Patterson,³⁰ was but part of a larger move affecting waitresses on the daylight and other shifts, which he deemed necessary to correct various then existing problems.

While he attempted to transfer Shepler and Patterson to the later shift where they could not intimidate the waitresses on the daylight shift, he concurrently also re-assigned waitresses Jean O'Rourke and Barbara Walker from the 4 p.m. to midnight shift to the daylight shift. He also brought Lee Ann Morris, a waitress on the midnight to 8 a.m. shift to the 8 a.m. to 4 p.m. shift. Lehman reasoned that, although O'Rourke and Morris had problems, they had pleasant personalities and would relate well to the customers on their new shift where a different atmosphere was needed. Walker, too, was described as having a good strong personality which he expected would be beneficial there. At the same time, Elsie Berchtold was demoted from assistant supervisor to waitress on the 4 p.m. to midnight shift because of her performance.

Lehman pointed out that all of these changes, which coincided with the attempted rescheduling of Shepler and Patterson, were consistent with his practice of reassigning employees to different shifts, as needed. The record reveals that from the time Lehman became restaurant manager in May 1980 through April 4, when Shepler and Patterson were reassigned, Lehman had made 23 shift changes, including Shepler, Patterson, and the other then affected employees. Of these 23 shift transfers, 5 had requested the reassignments made, and 18 had not. Of the 18 who had not wanted different hours, 11, including Shepler and Patterson, had not wished to make the particular changes assigned. Thereafter, from April 10, 1981, to June 1, 1982, the time of the hearing, 27 other employees were assigned to different shifts by Lehman, some on multiple occasions.

Contrary to his testimony at Shepler's later state unemployment compensation hearing, Lehman denied having been told that Shepler was involved in urging other waitresses to call in sick in furtherance of the protest against the 6-day week until about 2 weeks after she had left and, therefore, that consideration had not been a factor in his decision. Rather, he indicated other areas of the transcript where he had stated reasons for rescheduling Shepler consistent with those described above.³¹

²⁶ In addition to the complaints received by Lehman about Shepler from other waitresses and again from customers, Lehman also heard a continuing stream of complaints about the waitresses from Shepler.

²⁷ This uncontroverted account of Shepler's conduct on the morning of March 29 is credited.

²⁸ Lehman, contrary to Shepler, expressed surprise at hearing of Shepler's stated inability to work the later shift as Shepler previously had told him that she went out socially almost every evening and patronized local bars. In the past, she had complained to him about how bad she felt after having stayed out late. In addition, Lehman, in their small community, had seen Shepler socializing "many times" on the outside during evening hours. Accordingly, he testified that he had not anticipated that the proposed shift change would have caused her to leave her job. In reaching a determination herein, however, no reliance is placed on characterizations of Shepler's afterhours social habits. Shepler testified that she needed help with her daughter principally during the afternoon hours as her sister could assist in this respect in the evenings and, in fact, Shepler had announced her availability in the later hours, having offered to work the midnight to 8 a.m. shift. Accordingly, Lehman's testimony that Shepler was free in the evenings is not necessarily inconsistent with Shepler's stated concern that someone be available to her young daughter when she return from school. Therefore, I credit Shepler's testimony that Lehman had advance notice that Shepler would have difficulty working the 4 p.m. to midnight shift.

²⁹ Although the matter was not discussed, Shepler would have gone to the later shift only as a waitress and not as assistant supervisor.

³⁰ Patterson, in circumstances somewhat analogous to Shepler, also refused Lehman's April 4 request to move after April 9 to the 4 to midnight shift because she had to care for an invalid aunt. Lehman similarly had rejected Patterson's counteroffer to work the midnight to 8 a.m. shift on grounds that she was too nervous and that the shift was not remunerative. Patterson, in turn, refused Lehman's suggestion that she try the new hours for a 2-week trial period and also left after April 9. Although alleged as a discriminatee in the first amended charge herein, Patterson, who had not directly joined in the March 24 protest to Lehman, was not included in the complaint.

³¹ Lehman's contradiction of his earlier testimony before the state agency will be evaluated later in this Decision.

Lehman testified that, about 2 weeks after Shepler's April 9 departure, Roger Few, the Respondent's general manager, told him that Shepler was in his office and would like to have her job back. Lehman told Few that he would have to put Shepler on the 4 to 12 shift; he could not put her back on the daylight shift. Few replied that it was up to Lehman to determine if he wanted to bring Shepler back and, if so, the shift she would work. He agreed to Few's suggestion that he talk to Shepler as she really needed her job.

Few left Shepler in Lehman's office where he and Pohill met with her. Shepler told Lehman that she would like to return to work. Lehman answered that she must realize that he had to put her on the 4 p.m. to midnight shift and could not change his thinking in that regard. Shepler replied that she knew and that it was going to be hard. Lehman again suggested that Shepler should try the new hours and see how they worked out. If the new schedule did prove satisfactory, Shepler would make a lot more money on the 4 p.m. to midnight shift than on the 8 a.m. to 4 p.m. shift, because the later shift is much busier. He reiterated that she should see if it worked out for her and to get back to him in a couple of weeks. Shepler said that she would.

Lehman then gave Shepler two uniforms and wrote her name on the work schedule. She was to start the next evening. They shook hands and Lehman asked if they still were friends. Shepler said that they were. Lehman told her, "Good! Come back the next day and everything will be fine."

Lehman related that, a couple of hours later, Shepler called and announced that she just could not do it; she was not going to be able to come back to work. The uniforms were returned to the restaurant on the following day.

2. Discussion and conclusions

To establish a constructive discharge, it must be proven that the burdens upon the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign. It also must be shown that these burdens were imposed because of the employee's union or other protected concerted activities.³²

It is clear from the above facts that the rescheduling of Shepler from 8 a.m. to 4 p.m. to the 4 p.m. to midnight shift, in light of her situation, subjected her to more onerous working conditions and, from the credited testimony, it is concluded that, when he reassigned her, Lehman might well have anticipated that Shepler could not agree to work the later shift. The inquiry then is whether the Respondent would have so reassigned Shepler if, 11 days before, she had not been spokesperson in a concerted protest to Lehman about having to work an extra day on most weeks.

As noted, I have credited Lehman's account of the March 24 events over that of Shepler as his testimony was supported by the General Counsel's witness, Dolores Walker. Accordingly, I find that, when Shepler told Lehman that she and the other waitresses did not want

to continue to work the 6-day week, Lehman did not threaten to fire her or others if they did not work the 6-day schedule, and that nothing was said at that time about a sickout.³³ Lehman's description of Shepler's attitude and performance are credited as generally corroborated. I also accept the accounts by Lehman and Walker that it was not until later that afternoon that Lehman called the waitresses together and, in effect, told them that he did not care if the rumor that they intended to call in sick the next day was true because he would have five other waitresses in the restaurant by 8:15 a.m. Accordingly, having found that Lehman did not threaten to fire Shepler and/or the others, as described by Shepler, if they refused to work 6 days, I do not find that the Respondent violated Section 8(a)(1) of the Act in that respect.³⁴

The General Counsel has established that Shepler served as spokesperson for other waitresses on the morning of March 24 in conveying to the Respondent their dislike of the longer workweek; that although Shepler as assistant supervisor had enjoyed a favored position, with greater responsibilities and earnings, she was notified 11 days after the protest, on April 4, that she was being involuntarily reassigned to a later shift to work hours which the Respondent had prior reason to believe would not be acceptable to her. Lehman conceded at Shepler's subsequent unemployment compensation hearing that a reason for the transfer was his information that Shepler had urged other waitresses to "call off sick together." Finally, it was established that on April 9, as a result of this transfer, Shepler left the Respondent's employ, and, although offered work when she reapplied approximately 2 weeks later, the Respondent never altered its position about assigning her to the 4 p.m. to midnight shift. While Shepler may have felt economically pressured into initially accepting the reemployment offer on that basis until she could reverify whether someone would be available to look after her daughter, the basic situation had not changed.³⁵ When no sitter could be had, Shepler notified the Respondent that she still could not take the job as offered.

The Respondent, in turn, proved that Shepler and/or others were not threatened with discharge on March 24 for refusing to work the 6-day week, as alleged in the complaint. Rather, Shepler, who had a history of moodiness, had had problems with customers and other wait-

³³ Although Patterson was supportive of Shepler in her testimony concerning Lehman's threat of discharge, she had not been present when Shepler, Walker, and Kasic had met with Lehman, but merely had been told by Shepler what happened immediately after Shepler had returned to work. Since Patterson, unlike Walker, had not been on the scene, her testimony, even if considered a *res gestae* exception to the rule against hearsay evidence, is entitled to less weight.

³⁴ Lehman's statement to the waitresses later on March 24 concerning the action he would take in the event of a rumored sickout merely was tantamount to a threat to lawfully replace economic strikers and was not violative of the Act. See *Television Wisconsin*, 224 NLRB 722, 765-766 (1976).

³⁵ Accordingly, if concluded that Shepler had been constructively discharged on April 9 in violation of Sec. 8(a)(1) of the Act, as alleged in the complaint, the offer of reemployment during the same undesirable hours would not have constituted an offer of reinstatement to her former position and her disjointed temporary acceptance of same under economic duress would not have served to limit any backpay entitlement.

³² *K & S Circuits*, 255 NLRB 1270 (1981).

resses. The Respondent's contentions concerning Shepler's attitude and difficulties are supported by the weight of the evidence, including two recorded warnings on October 28 and November 8, 1980, respectively, by the testimony of coworkers, and by other unrecorded admonitions testified to by Lehman.³⁶ The Respondent inferred that there was no need to take further action concerning Shepler at the time of these entries, as after the November 8 interview she showed a marked improvement lasting until February. By March, she had lapsed into her old ways. Only 6 days before being notified of her reassignment, Shepler had reported ill after having created a disturbance that same morning in the Respondent's restaurant, while off duty and intoxicated.

Shepler's notification of reassignment was part of an intershift movement of personnel affecting three other employees besides herself and Patterson, and also the demotion of an assistant supervisor. It appears that reassignment of waitresses to other shifts was commonly practiced by the Respondent both before and since the attempt to transfer Shepler and, therefore, "not indicative of an onerous working condition in itself."³⁷

The most unpersuasive part of Lehman's testimony was his attempt to explain away his clear statement at Shepler's unemployment compensation hearing that a consideration in his effort to transfer Shepler had been her involvement in attempting to convince other waitresses to call off sick together, and his further testimony that he had not discussed this with Shepler at the time, preferring to stay off the subject. In the present proceeding, Lehman contended that he had not learned of Shepler's efforts to persuade waitresses to engage in a sickout until around 2 weeks after Shepler had left, when he was told of this by certain waitresses. This, however, is completely inconsistent with his sworn testimony before the state agency, particularly as his statement there, that he had decided not to talk to Shepler about the matter but just to put her on the other shift, clearly comprehends an admission that, when he changed her shift, he had already obtained information about her efforts to organize a sickout. As Lehman's testimony at the state proceeding was spontaneous with less motivation there to be guarded on this point, his subsequent effort to avoid the earlier admission is not credible.³⁸

However, noting that, during the state agency proceeding, Lehman also testified at length as to other reasons for rescheduling Shepler, consistent with those given here, and that his testimony at this hearing was effectively corroborated in material respects, I find that the attempt to reschedule Shepler was supported by legitimate business considerations. Although assistant supervisor, she had been a source of difficulty to coworkers and customers. The record shows that Shepler was

not treated disparately, but was dealt with no more firmly than Patterson, not alleged as a discriminatee, whom the Respondent also held responsible for problems on the daylight shift. Other waitresses who had joined in Shepler's protest were not rescheduled or disciplined. Shepler's reassignment was part of a larger reorganization affecting other waitresses with various work hours, and was consistent with the Respondent's established practice of moving employees to different shifts, as needed.³⁹

From the credited evidence, it has been found that Lehman did not threaten to terminate Shepler and/or others who had protested the longer workweek and it is noted that the timing of the shift transfer was proximate not only to Shepler's concerted protest, but also to her relapsed work attitude and conduct, augmented by her behavior of March 29.

I do not discount the significance of Lehman's admission at the unemployment compensation hearing that a reason for his action was information that Shepler had engaged in protected activities. Words should be given their meaning and, before the more multifaceted approach mandated by the Board's *Wright Line*⁴⁰ decision, such a concession probably would have been controlling. Yet, here, Shepler, although not a supervisor, during her last months with the Respondent, was the Respondent's most senior representative daily assigned to the dining area during the first half of her shift. In these circumstances, the Respondent, in the operation of its business, was entitled to expect that she not be a source of friction and discord among her fellow workers and the public alike. As this expectation was unfulfilled and for the other reasons set forth above, I find from the weight of the evidence that Shepler would have been reassigned even in the absence of her protected activities, actual or perceived.⁴¹

³⁹ The General Counsel's brief argues for the existence of two "critical considerations" indicating that the Respondent's reasons for changing Shepler's shift was pretextual. First, the General Counsel points out that Shepler's shift had not been changed earlier, in the fall of 1980, when her negative work attitude originally was noted and while other staffing changes were in progress. Second, the decision to shift both Shepler and Patterson to the third shift, although they had had personal differences, was inconsistent with Lehman's stated purpose of creating shift harmony to improve service and the work environment. Neither point is persuasive. Lehman had not ignored Shepler's conduct in October and November 1980, but had reprimanded her at least twice formally in his office, had entered such interviews on her personnel record, and had spoken to her informally on other occasions. Thereafter, her attitude had become better and the shift change, when it did occur, corresponded to the end of her period of improvement. As to the second point, the Respondent's expressed particular goal had been to increase the profitability of the second shift by attracting more local traffic, in furtherance of which it eventually was deemed necessary to reschedule Shepler and Patterson. Patterson, who testified in Shepler's interest both at the unemployment compensation hearing and in this proceeding, considered her earlier differences with Shepler to have been minor.

⁴⁰ *Wright Line*, 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981).

⁴¹ See *Wright Line*, *supra*.

As noted, the decision and underlying record of the Commonwealth of Pennsylvania Department of Labor and Industry regarding the circumstances of Shepler's departure in the Respondent's employ were received into evidence in this proceeding. Such a decision by a state agency is admissible "for whatever probative value it may have." *Boulder Excavating*

Continued

³⁶ Shepler's denial that she had been criticized is overcome by the Respondent's business records to the contrary.

³⁷ *K & S Circuits, supra*; *Unimet Corp.*, 172 NLRB 1762, 1771, fn. 33 (1968).

³⁸ In view of Lehman's concession that a reason for his attempted reassignment of Shepler was information that she had tried to involve other waitresses in a sick-out, a protected concerted activity, it is immaterial that Shepler, in fact, had not engaged in such conduct. See *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Shepler's references to her health were personal and did not involve other employees.

Accordingly, it is concluded that a preponderance of the evidence does not show that the Respondent has violated Section 8(a)(1) of the Act.

Upon the foregoing findings of fact and upon the entire record in this case I make the following:

Co., 260 NLRB 1283 (1982); *Supreme Dyeing & Finishing Corp.*, 147 NLRB 1094, 1095, fn. 1 (1964). However, determinations by state agencies are not controlling. As the Board noted in *Bolsa Drainage*, 242 NLRB 728, fn. 1 (1979):

The state agency's determination was rendered under a statute with different definitions, policies, and purposes than the National Labor Relations Act Our decision and that of the Administrative Law Judge must be made upon an independent consideration and evaluation of the evidence received in this unfair labor proceeding.

Applying the independent consideration and evaluation of the evidence, as required in *Bolsa Drainage*, *supra*, I find that the conclusion of the state agency referee that Shepler's own behavior during the daylight shift had not led to the change in shifts was based on a record substantially less complete than in the present matter, was not consciously based on consideration of the unfair labor practice issues herein, and is of limited probative value.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The General Counsel has failed to establish by a preponderance of the evidence that the Respondent has engaged in, or is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁴²

It is ordered that the complaint be dismissed in its entirety.

⁴² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.